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No. 01-723

In The

Supreme Court of the United States

PENOBSCOT NATION; PASSAMAQUODDY TRIBE; BARRY L. DANA, in his capacity as Chief of the Penobscot Nation; RICHARD M. DOYLE, in his capacity as Governor of the Passamaquoddy Tribe; and RICHARD STEVENS, in his capacity as Governor of the Passamaquoddy Tribe,

Petitioners,

v.

GEORGIA-PACIFIC CORPORATION; GREAT NORTHERN PAPER, INC.; INTERNATIONAL PAPER COMPANY; and the STATE OF MAINE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENTS GEORGIA-PACIFIC CORPORATION'S AND GREAT NORTHERN PAPER, INC.'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Was the United States Court of Appeals for the First Circuit required to vacate the United States District Court for the District of Maine's decision that it lacked subject matter jurisdiction under the well-pleaded complaint rule when the First Circuit affirmed the District Court's ruling on the alternate grounds of *res judicata*, thereby depriving the original decision of issue preclusive or binding precedential effect?

2. In addressing Petitioners' motion for rehearing and rehearing en banc, was the United States Court of Appeals for the First Circuit required to expunge language from its decision discussing jurisdictional issues before entering judgment based on *res judicata* principles?

CORPORATE DISCLOSURE STATEMENT

1. Respondent Great Northern Paper, Inc. is a wholly-owned subsidiary of Inexcon Maine LLC. There are no publicly held companies that own 10% or more of the party's stock.

2. Respondent Georgia-Pacific Corporation has no parent companies, and there are no publicly held companies that own 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

I. The Status of the Tribes Under the Settlement Acts 2

II. The Factors Prompting the Companies' FOAA Requests 4

III. The Resulting State and Federal Litigation 5

REASONS FOR DENYING THE WRIT 7

I. There Is No Basis To Vacate the District Court's Decision On Equitable Grounds 8

II. There Is No Reason To Vacate the First Circuit's Discussion of the Well-Pleaded Complaint Rule On Equitable Grounds 14

III. Even If This Court Chooses To Grant the Writ, A Summary Disposition Is Inappropriate 16

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Akins v. Penobscot Nation, 130 F.3d 482 (1st Cir. 1997) 4

Audette v. Sullivan, 19 F.3d 254 (6th Cir. 1994) 10

Blue Cross & Blue Shield v. Nielsen, 142 F.3d 1375 (11th Cir. 1998) (per curiam) 11

Dedham Water Co. v. Cumberland Farms Dairy, Inc., 972 F.2d 453 (1st Cir. 1992) 16

Dilley v. Gunn, 64 F.3d 1365 (9th Cir. 1995) 17

Gelb v. Royal Globe Ins. Co., 798 F.2d 38 (2d Cir. 1986) 10

Great Northern Paper, Inc. v. Penobscot Nation, 2001 ME 68, 770 A.2d 574, *cert. denied*, 70 U.S.L.W. 3338 (U.S. Nov. 13, 2001) 1, 4, 5, 6, 7

Great Northern Paper, Inc. v. Penobscot Nation, CV-00-329 (Me. Super. Ct., Cumb. Cty., Sept. 19, 2000) (Crowley, J.) 6

Hoult v. Hoult, 157 F.3d 29 (1st Cir. 1998) 10, 15

In re Smith, 964 F.2d 636 (7th Cir. 1992) 12, 13

Mills v. Apfel, Civil No. 99-27-P-H, 2000 U.S. Dist. LEXIS 9691 (D. Me. Mar. 6, 2000) 12

Oklahoma Radio Assocs. v. Magnolia Broad. Co., 3 F.3d 1436 (10th Cir. 1993) 12

Penobscot Nation v. Stilphen, 461 A.2d 478 (Me.), *appeal dismissed for want of a substantial federal question*, 464 U.S. 963 (1983) 3

TABLE OF AUTHORITIES – Continued

Page

Potomac Greens Assocs. P'ship v. City Council, 6 F.3d 173 (4th Cir. 1993) 11

U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18 (1994) 9, 17

United States v. Munsingwear, 340 U.S. 36 (1950) 13

STATUTES

U.S. Const. art. I, § 7 3

U.S. Const. art. II, § 2 3

5 U.S.C.A. § 552 5

25 U.S.C.A. §§ 1721-1735 3

25 U.S.C.A. § 1724(g) 3

33 U.S.C.A. §§ 1251-1387 4

Me. Rev. Stat. Ann. tit. 1, §§ 401-410 1

Me. Rev. Stat. Ann. tit. 1, § 409(1) 6

Me. Rev. Stat. Ann. tit. 30, §§ 6201-6214 3

Me. Rev. Stat. Ann. tit. 30, § 6204 5

LEGISLATIVE HISTORY

H.R. Rep. No. 96-1353 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3786 3

REGULATIONS

66 Fed. Reg. 12,791 4

TABLE OF AUTHORITIES – Continued

Page

RULES

Sup. Ct. R. 10(a) 8, 11, 16

MISCELLANEOUS AUTHORITIES

Restatement (Second) of Judgments § 27 ..... 10, 16

Restatement (Second) of Judgments § 27 cmt. h 16

Restatement (Second) of Judgments § 27 cmt. o 10

18 James Wm. Moore, et al., Moore's Federal Practice § 132.03[4][a] 13

18 James Wm. Moore, et al., Moore's Federal Practice § 134.02[1][d] 12

STATEMENT OF THE CASE

This is the second petition for certiorari that Petitioners (hereinafter "the Tribes") have filed this year, both arising out of their refusal to comply with Maine's Freedom of Access Act ("FOAA"), Me. Rev. Stat. Ann. tit. 1, §§ 401-410 (West 1989 & Supp. 2001).

In the first petition, the Tribes sought review of the Maine Supreme Judicial Court ("SJC")'s decision on the merits, in which the SJC held that the Tribes had to comply with some, but not all, of the FOAA requests served upon them by the Respondents (hereinafter "the Companies"). *See Great Northern Paper, Inc. v. Penobscot Nation*, 2001 ME 68, 770 A.2d 574, *cert. denied*, 70 U.S.L.W. 3338 (U.S. Nov. 13, 2001).[1]

In the instant petition, the Tribes challenge the decision of the United States Court of Appeals for the First Circuit rejecting the Tribes' effort to collaterally attack the SJC's decision. While the exact scope of the relief sought is not clear, it appears that the Tribes are not challenging the First Circuit's holding that the Tribes' parallel attempt to litigate the FOAA issues in federal court failed on *res judicata* grounds. Rather, it appears that the Tribes want this Court to order the First Circuit to (1) vacate the decision of the District of Maine, which the First Circuit affirmed on the alternate *res judicata* ground; and (2) expunge from the First Circuit's decision some portion of

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[1] There were originally three companies involved in this dispute. International Paper Company, the successor in interest to Champion International Corporation and one of the parties below, is not participating in this Brief.

the discussion of the well-pleaded complaint rule, upon which the District Court's initial decision was based.

In sum, having chosen to file this federal suit and forced the Companies to litigate it through a rehearing en banc motion in the First Circuit, the Tribes are now asking this Court to expunge the record as if their suit were never filed in the first place.

The Tribes argue that, when a federal court of appeals decides a case based on an alternate ground from that relied upon by the district court, equity compels the appellate court to (1) vacate the district court's decision; and (2) include no language in its own opinion discussing the ground upon which the district court relied. Aside from the fact that no legal authority exists for such a novel and extraordinary request, the Tribes have no equitable basis to seek such relief, however broadly the term equity is construed. While the Tribes allude opaquely to some sort of prejudice in letting the record stand as is, when a district court decision is affirmed on alternate grounds, the original ground upon which that decision was made is not binding upon any court. Similarly, the First Circuit's discussion of that original ground does not bind that Court of Appeals, nor any other court, to any particular determination on that issue in the future. Hence, the Tribes' Petition is devoid of any legal or logical support.

I. THE STATUS OF THE TRIBES UNDER THE SETTLEMENT ACTS

Rather than repeat a lengthy narrative of this dispute, the Companies provide only a summary of the

essential facts here. A more detailed factual background is found in the Companies' Statement of the Case from its Brief in Opposition to Petitioners' first petition. A copy of that Statement is included in the Appendix hereto. (*See* Respondents' Appendix, hereinafter "Resp. App.," at App. 1.)

Briefly, the Tribes' status as Indian tribes is "atypical." (Petitioners' Appendix, hereinafter "Pet. App.," at 5.) This unique status flows from two legislative enactments, one state and one federal (collectively "the Settlement Acts"): (1) the Maine Act to Implement the Indian Claims Settlement, Me. Rev. Stat. Ann. tit. 30, §§ 6201-6214 (West 1996 & Supp. 2001) ("MIA"); and (2) Congress's ratification of MIA in the Maine Indian Claims Settlement Act of 1980, 25 U.S.C.A. §§ 1721-1735 (West 2001) ("MICSA").[2] *See Penobscot Nation v. Stilphen*, 461 A.2d 478, 489 (Me.), *appeal dismissed for want of a substantial federal question*, 464 U.S. 963 (1983) (stating the Settlement Acts "set up a relationship between the tribes, the State, and the Federal government different from the relationship of Indians in other States to the State and Federal government").

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[2] While not relevant to the issues raised by the Tribes in their Petition, the Tribes' characterization of the Settlement Acts as a "modern-day, tripartite treaty" (Pet. for Cert. at 5 n.1) is incorrect. Because the Nonintercourse Act does not apply to the Tribes, 25 U.S.C.A. § 1724(g) (West 2001), the MICSA is not a treaty, but a statute passed by both houses of Congress and signed by the President. *See* H.R. Rep. No. 96-1353 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3786. In contrast, a treaty is negotiated by the President and ratified by two-thirds of the Senate. *Compare* U.S. Const. art. I, § 7 (statutes) *with* U.S. Const. art. II, § 2 (treaties).

As a result of this legislation, the rule in Maine is that each Indian tribe "in certain capacities functions as a municipality of Maine and is reachable under State and Federal law in that capacity, but when it functions as a tribe as to internal tribal matters, it is not." *Akins v. Penobscot Nation*, 130 F.3d 482, 485 (1st Cir. 1997).

II. THE FACTORS PROMPTING THE COMPANIES' FOAA REQUESTS

The Companies discharge wastewater into rivers in Maine under federal and state discharge licenses. *Great Northern Paper*, 2001 ME 68, ¶ 3, 770 A.2d at 577. Pursuant to the National Pollutant Discharge Elimination System ("NPDES") program of the Clean Water Act, 33 U.S.C.A. §§ 1251-1387 (West 2001), the State of Maine has applied to the U.S. Environmental Protection Agency ("EPA") to obtain primary authority to issue all NPDES permits in Maine. *Great Northern Paper*, 2001 ME 68, ¶ 4, 770 A.2d at 577-78.[3]

The Companies support full NPDES delegation to the State of Maine because it would simplify their licensing processing, reducing costs. The Tribes oppose the delegation, and, in response to the State's application, asked the EPA to conclude that the State lacks authority to regulate the water resources within their reservations because, according to the Tribes, they are entitled to be treated

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[3] On January 12, 2001, the State's application was granted for all parts of the State, except disputed Indian country, where the EPA has yet to make a final decision. 66 Fed. Reg. 12,791 (Feb. 28, 2001).

under the Clean Water Act as a separate "state." *Id.* This Tribal assertion of "state" status, impervious to state regulatory oversight of environmental issues, conflicts with the plain language of the Settlement Acts. *See, e.g.*, Me. Rev. Stat. Ann. tit. 30, § 6204 ("Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them . . . shall be subject to the laws of the State . . . .").

On March 9, 2000, counsel for the Companies discovered the existence of agreements between the Tribes and the EPA providing, among other things, that the EPA will make its best efforts to protect from disclosure all communications between the Tribes, the EPA, and other federal agencies, if requested under the federal Freedom of Information Act, 5 U.S.C.A. § 552 (West 1996 & Supp. 2001). (*See* Record Item No. 14 before the Maine Supreme Judicial Court, in *Great Northern Paper, Inc. v. Penobscot Nation*, Docket No. CUM-00-573, at ¶¶ 4, 6.)

Concerned about the content of these communications and their potential conflict with the Settlement Acts, the Companies served FOAA requests on the Tribes, seeking documents relating to the Tribes' efforts to gain regulatory powers over water resources within or adjacent to their borders. *Great Northern Paper*, 2001 ME 68, ¶¶ 5-6, 770 A.2d at 578.

III. THE RESULTING STATE AND FEDERAL LITIGATION

On May 10, 2000, the Tribes rejected the Companies' FOAA requests, arguing that FOAA did not apply to

them. *Id.* at ¶ 7, 770 A.2d at 578. Under FOAA, the Companies had to wait five working days before they could pursue their FOAA rights by filing an action in Maine Superior Court. Me. Rev. Stat. Ann. tit. 1, § 409(1). Before the Companies could file that action, the Tribes filed the instant suit in federal court, seeking an injunction against the state court action and a declaratory judgment that they do not have to comply with FOAA. (Pet. App. at 26.) After the statutory waiting period, the Companies promptly filed their state court action. *Great Northern Paper, Inc. v. Penobscot Nation*, CV-00-329, at 2 (Me. Super. Ct., Cumb. Cty., Sept. 19, 2000) (Crowley, J.). Hence, two actions, the Companies' state FOAA action and the Tribes' federal declaratory judgment action, were launched.

In the federal action, with the state Superior Court action pending, the Companies filed a motion to dismiss, asserting various jurisdictional defenses, including the well-pleaded complaint rule, which provides that federal jurisdiction cannot be based on a defense to a state law claim. The federal District Court (Hornby, C.J.) agreed that the well-pleaded complaint rule applied, and dismissed the Tribes' action on that basis. (Pet. App. at 38.) The Tribes filed a motion for reconsideration. (*Id.* at 17.)

While that reconsideration motion was pending, the state FOAA action proceeded to final judgment, with the Superior Court granting the Companies' motion for summary judgment. *Great Northern Paper*, 2001 ME 68, ¶¶ 8-10, 770 A.2d at 579. Back in the federal court, the Companies alerted the District Court to the final judgment; in rejecting the motion to reconsider, the District

Court chose again to rely on the well-pleaded complaint rule jurisdictional ground. (Pet. App. 18 & 24 n.6.)

Back in the state court, the Tribes appealed the Superior Court decision. The SJC affirmed in part and vacated in part on May 1, 2001. *Great Northern Paper*, 2001 ME 68, ¶ 64, 770 A.2d at 592.

The Tribes also appealed Judge Hornby's decision to the First Circuit Court of Appeals. Both the well-pleaded complaint rule and *res judicata* issues (among others) were briefed and argued. (*See* PACER docket entry for 12/20/00, Br. of Appellees in *Penobscot Nation v. Georgia-Pac. Corp.*, Civ. No. 00-2265 (1st Cir.) at 8-21; *see also* PACER docket entry for 12/28/00, Reply Br. of Appellants in *Penobscot Nation v. Georgia-Pac. Corp.*, Civ. No. 00-2265 (1st Cir.) at 13-25.) The First Circuit affirmed dismissal, choosing to base its decision on the *res judicata* ground. (Pet. App. at 4-5.) The First Circuit denied the Tribes' request for rehearing and for rehearing en banc on August 24, 2001. (*Id.* at 39-41.)

REASONS FOR DENYING THE WRIT

The Tribes claim that under the rule of vacatur, they cannot be "forced to live under the cloud of the [D]istrict [C]ourt's unreviewed decisions," and that the First Circuit's refusal to expunge its discussion of the well-pleaded complaint rule somehow conflicts with the decisions of other circuits or is otherwise so far beyond the usual course of judicial proceedings as to require an exercise of this Court's supervisory powers. (*See* Pet. for Cert. at 3.) The Tribes do not specify whether they fear

future preclusive or precedential effects of these courts' decisions, or both, or precisely what language in the First Circuit's decision that they wish to erase.

The Tribes do not cite a single case that supports their novel propositions that (1) a district court decision affirmed on alternate grounds must always be vacated; and (2) a decision rejecting a claim on *res judicata* grounds must be stripped of any language discussing any other potential ground for dismissal, including jurisdiction. This lack of support is not surprising, because, as a matter of law, the District Court's decisions and First Circuit's discussion of the well-pleaded complaint rule have neither issue preclusive nor binding precedential effect. Hence, vacatur would serve no equitable purpose. There is no conflict between the First Circuit's decision denying the Tribes' petition to vacate and the decisions of other circuits, let alone a departure from the accepted course of judicial proceedings that would justify exercise of this Court's supervisory powers. Sup. Ct. R. 10(a). Therefore, the writ should be denied.

I. THERE IS NO BASIS TO VACATE THE DISTRICT COURT'S DECISION ON EQUITABLE GROUNDS

The Tribes state that they seek vacatur to avoid the potential future impact of the District Court's decision that the well-pleaded complaint rule barred jurisdiction in this case. Their argument proceeds from an incorrect premise, and, therefore, they misapprehend the application of the vacatur doctrine to this case.

Vacatur is an equitable doctrine providing that a party should not suffer the negative effects of a district

court judgment when it is denied the benefit of appellate review through happenstance. *See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994).

Here, the Tribes were not denied the benefit of appellate review. A portfolio of reasons to dismiss the Tribes' federal action was presented to the District Court and the First Circuit. The District Court chose to base its decision on reason #1 (the well-pleaded complaint rule). The First Circuit chose reason #2 (*res judicata*). At the time the appeal was briefed and argued, the First Circuit was fully cognizant of all the relevant facts. It analyzed all the arguments, including both the well-pleaded complaint rule and *res judicata*, and contoured its opinion in light of all then and now existing circumstances and all the arguments fully and fairly presented to it.

For the reasons that the First Circuit articulated in its decision, it chose to rest its holding upon the *res judicata* ground. It does not follow from this choice, however, that its analysis, or the District Court's analysis, of the well-pleaded complaint rule should be stricken from the annals as if the well-pleaded complaint rule had never been raised at all. On the contrary, as both the District Court and the First Circuit's decisions noted, the issue is a complex one that can only benefit from reasoned analysis by jurists such as Chief Judge Hornby and Chief Judge Boudin.

Here, moreover, their analyses have only persuasive, not binding, impact upon the Tribes. Because of its equitable nature, the vacatur doctrine logically applies only when the party invoking the doctrine might be subject to some unfair consequence absent vacatur. Here, not only

would any consequence not be unfair (for the reasons noted above), but there is no concrete consequence in the first place.

The Tribes' flawed premise is, apparently, that the District Court's conclusion that it lacked subject matter jurisdiction due to the well-pleaded complaint rule somehow binds that or other courts. (*See* Pet. for Cert. at 3: "Those decisions . . . stand against the Tribes for the future.") But it is well established that there is no issue preclusive effect to the original decision when an appellate court affirms on alternate grounds, as it did here. Restatement (Second) of Judgments § 27 cmt. o (1982); *see also Audette v. Sullivan*, 19 F.3d 254, 257 (6th Cir. 1994) (holding there is no preclusive effect to district court's decision when affirmed on different grounds); *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986) (holding "if an appeal is taken and the appellate court affirms on one ground and disregards the other, there is no collateral estoppel as to the unreviewed ground").

Because the First Circuit follows the rule in Section 27 of the Restatement (Second) of Judgments, neither of the District Court's decisions on the application of the well-pleaded complaint rule has preclusive effect. *Hoult v. Hoult*, 157 F.3d 29, 31 (1st Cir. 1998). Petitioners fail to cite any authority contrary to this basic point, and therefore cannot show that the First Circuit's decision in any way conflicts with the decisions of other circuits, or is

somehow beyond the usual course of proceedings, as required by Rule 10(a) of this Court.[4]

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[4] The only two decisions cited by the Tribes (Pet. for Cert. at 20) of even potential relevance only underscore the differences between the instant situation and those where vacatur might arguably be appropriate within the discretion of the Court of Appeals. *See Blue Cross & Blue Shield v. Nielsen*, 142 F.3d 1375 (11th Cir. 1998) (per curiam); *Potomac Greens Assocs. P'ship v. City Council*, 6 F.3d 173 (4th Cir. 1993).

In *Blue Cross*, the question was whether the Alabama Provider Act applied to Blue Cross. The District Court said no. It additionally concluded that even if the Act did apply, it would be preempted by ERISA. The Eleventh Circuit Court of Appeals certified the application question to the Alabama Supreme Court, which declared that the Act did not apply. The Court of Appeals then accepted the Supreme Court's conclusion and vacated the District Court's decision on the preemption issue. *See Blue Cross*, 142 F.2d at 1376.

In *Potomac Greens*, the plaintiffs challenged a local zoning ordinance. The District Court agreed with two of their arguments: (1) the defendant had violated a state notification statute; and (2) the defendant had violated a state rule of statutory construction. The Fourth Circuit Court of Appeals certified both issues to the Virginia Supreme Court. The Supreme Court declared that the notice statute had been violated, and declined to address the statutory construction issue. Because the state court declined to address it, the Court of Appeals vacated the District Court's ruling on that issue as well. *See Potomac Greens*, 6 F.3d at 177.

Thus, both cases went to state law issues, and the federal courts demurred to the highest state courts' rulings. The district court's conclusion on ERISA preemption in *Blue Cross* was no longer valid because the state law did not apply to the plaintiff in the first place. A law cannot be preempted if it does not apply. In *Potomac Greens*, the ordinance was similarly inapplicable by virtue of the defendant's violation of the state notification statute rendering the ordinance void *ab initio*.

Similarly, although it is an open question whether vacatur can appropriately be used to invalidate the precedential effects of decisions, *see, e.g., In re Smith*, 964 F.2d 636, 638 (7th Cir. 1992) ("We vacate unappealable decisions, to prevent them from having a preclusive effect. We do not vacate opinions, to prevent them from having a precedential effect."), it is clear that district court decisions are not binding precedent even within the same district. *See* 18 James Wm. Moore, et al., Moore's Federal Practice § 134.02[1][d]; *Mills v. Apfel*, Civil No. 99-27-P-H, 2000 U.S. Dist. LEXIS 9691, at *2 (D. Me. Mar. 6, 2000). Therefore, because the decision of the District Court in this case can have nothing more than persuasive value, there is once again no compelling reason to grant vacatur in this instance, and the Tribes have failed to supply one. *See Oklahoma Radio Assocs. v. Magnolia Broad. Co.*, 3 F.3d 1436, 1437 (10th Cir. 1993) (refusing to vacate and holding settlement agreement went "beyond the rationale of

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Here, in contrast, the Tribes seek to vitiate a federal court's decision on a question of federal jurisdiction. No state statute or ordinance has been eliminated by virtue of a determinative finding of state law, rendering any other federal court musing on that state statute or ordinance not only hypothetical but an intrusion into state legislation. The appeals presented to the Eleventh and Fourth Circuits were resolved by the state supreme court rulings. Here, the issue on appeal to the First Circuit on the well-pleaded complaint grounds was not eliminated by the Maine SJC's decision. In fact, the Tribes argued vigorously that *res judicata* principles did not apply. The well-pleaded complaint ground for dismissal remained as viable a ground for dismissal as it was in front of the District Court. The SJC decision *added* a ground for the First Circuit to review, as opposed to *eliminating* the need for review, as in the cases noted above.

vacatur" by agreeing to deprive decision of precedential effect); *In re Smith*, 964 F.2d at 638 (holding that courts lack jurisdiction under Article III to vacate decision that has no preclusive effect because parties have no tangible interest in mere precedential effect).

In sum, because the District Court's decisions can have neither issue preclusive nor binding precedential effect, any reason that could justify vacatur in another case does not exist here because there are no binding "legal consequences" to the unreviewed decision. *United States v. Munsingwear*, 340 U.S. 36, 41 (1950). Although the Tribes cite numerous cases where this Court has vacated decisions that could not be appealed through no fault of the parties, they do not cite any authority that the courts should waste resources vacating decisions that have been appealed, and the appellate court determines to affirm the decision below on alternate grounds after reviewing all the issues.

The Tribes' argument, when taken to its logical conclusion, cannot stand under its own weight. They would apparently require, upon a proper motion, that appellate courts vacate every district court decision that is affirmed on alternate grounds. But there is no logical reason to limit their argument at this point. It would seemingly also apply when an appellate court affirms on only one of a district court's alternate, independent grounds, even though the unreviewed ground could have neither preclusive nor binding precedential impact. *See* 18 James Wm. Moore, et al., Moore's Federal Practice § 132.03[4][a] (issue preclusion applies to "only those issues necessary to support the judgment entered in the first action").

Appellate courts acting in equity are not in the business of vacating decisions that do not have binding future effects, and would certainly need a legion of new staff attorneys to attend to such cases if they were. This Court should deny the writ.

II. THERE IS NO REASON TO VACATE THE FIRST CIRCUIT'S DISCUSSION OF THE WELL-PLEADED COMPLAINT RULE ON EQUITABLE GROUNDS.

In addition to seeking to vacate the District Court's decision on the application of the well-pleaded complaint rule, the Tribes also ask this Court to expunge some or all of the First Circuit's decision. (*See* Pet. for Cert. at 27-28.)

As a threshold matter, the Tribes fail to explain exactly what they seek to change about the First Circuit's opinion, and this Court should not be forced to guess. (*See* Pet. for Cert. at 27, alluding generally to a seven-page discussion of the well-pleaded complaint rule at Pet. App. 5-11, and/or language that "could be interpreted as approving the district court's decisions" at Pet. App. 9.) Nor do the Tribes suggest how this Court would go about carving out only those portions of the opinion that the Tribes find objectionable.

As an additional uncertainty, the Tribes twice request that this Court vacate the First Circuit's "judgment" (Pet. for Cert. at 23 & 29), even though they have not appealed the *res judicata* grounds relied upon in the decision to affirm the District Court. Vacating the judgment of the First Circuit would go well beyond addressing the Tribes' stated concerns about the application of the well-pleaded complaint rule.

Regardless what the Tribes seek to expunge from the First Circuit's decisions, they provide no authority for their request. The First Circuit's discussion of subject matter jurisdiction was logical in light of the District Court's decision. It is informed, well-reasoned and provides guidance on a difficult and complex issue, after both sides had a full and fair opportunity to brief the issue.

In any event, the First Circuit stated:

> [W]e are reluctant (despite the urging of the district court that we clear up the matter) to decide in advance of necessity whether a federal claim can be conjured out of a lawsuit by the Tribes asserting that the threatened actions violate the internal affairs limitation contained in Maine law and purportedly ratified by a federal statute. Perhaps there is not even a single answer to this question – it could conceivably turn on the circumstances. *See Penobscot I*, 106 F. Supp. 2d at 83, n.4. In all events, no answer is needed in this case . . . .

(Pet. App. at 11.)

Given that vacatur does not apply to decisions that have no preclusive or binding precedential effect, as discussed above, it strains credulity that this Court would grant certiorari to censor the First Circuit's discussion of jurisdiction. Once again, the Tribes cite no authority for the proposition that vacatur exists to wipe away a discussion that has no binding legal consequences.

Under federal law in the First Circuit, issue preclusion applies only to those elements that are "essential to the judgment." *Hoult*, 157 F.3d at 31 (citing Restatement

(Second) of Judgments § 27). The First Circuit's discussion of jurisdiction was not essential to the judgment, and therefore cannot have preclusive effect. *Id.*; Restatement (Second) of Judgments § 27 cmt. h. Nor do the First Circuit's statements have binding precedential effect. *E.g., Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 459 (1st Cir. 1992) ("Dictum constitutes neither the law of the case nor the stuff of binding precedent."). Finally, as a practical matter, if vacatur were available to expunge such discussions, this Court would constantly be rewriting opinions to ensure that only whatever it or the Petitioner deemed the core holding remained.

Once again, the Tribes have failed to present compelling authority that the First Circuit's decision conflicts with the decisions of other circuits or has "so far departed from the accepted and usual course of judicial proceedings" as to require this Court to exercise its jurisdiction. Sup. Ct. R. 10(a). The writ should be denied.

III. EVEN IF THIS COURT CHOOSES TO GRANT THE WRIT, A SUMMARY DISPOSITION IS INAPPROPRIATE.

Even if this Court chooses to grant the writ, the summary disposition sought by the Tribes would be inappropriate. (*See* Pet. for Cert. at 3 (asserting "because the First Circuit's error is clear" that "summary disposition is appropriate").) Because they fail to recognize that the District Court's decisions and the First Circuit's jurisdictional discussion have no binding impact, the Tribes wrongly argue that they "are locked out of the federal court." (Pet. for Cert. at 23.) The Tribes apparently

assume that vacatur is automatic, but this Court rejected that approach in *U.S. Bancorp*. *E.g.*, *Dilley v. Gunn*, 64 F.3d 1365, 1370 (9th Cir. 1995) (stating that automatic vacatur is no longer the established practice in light of *U.S. Bancorp*).

Pursuant to *U.S. Bancorp*, the Tribes, "as the party seeking relief from the status quo of the appellate judgment," must demonstrate "equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp*, 513 U.S. at 26. "As always when federal courts contemplate equitable relief, [the Court's] holding must also take account of the public interest." *Id.* To grant vacatur automatically, according to the Court, would treat judicial precedents as the private property of the litigants and disturb the orderly operation of the judicial system. *Id.* at 26-27.

As this Court has made clear, the primary route to seek relief from the consequences of a judgment is by appeal as of right and certiorari; the secondary option of vacatur is only available as a stopgap when orderly procedure otherwise fails. *Id.* at 27. No such procedural failure occurred here. The Tribes chose to file a parallel federal suit; the state suit was resolved first; the Court of Appeals had all the circumstances before it when it chose to discuss the well-pleaded complaint rule and base its holding on *res judicata* grounds. Given that the usual rules of preclusion and precedent will ensure that there are no binding legal consequences to the District Court's decisions or the First Circuit's discussion of the jurisdictional issue, and that the Tribes have declined to petition for certiorari on the merits of the decision below, there is

simply nothing present in this case that is urgent (or automatic) enough to justify a summary disposition.

CONCLUSION

For all the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX
TABLE OF CONTENTS

Page

Excerpt from Respondent Companies' Brief in Opposition, *Penobscot Nation v. Great Northern Paper, Inc.*, No. 01-381, Statement of the Case, previously lodged with this Court ..... App. 1

STATEMENT OF THE CASE

This case comes before the Court from the decision and order of the Maine Supreme Judicial Court, sitting as the Law Court, affirming in part and vacating in part an order of the Maine Superior Court requiring Petitioners to produce documents pursuant to state law.

In the decision below, the Law Court held that Petitioners must comply in part with a document request served on them by Respondents under Maine's Freedom of Access Act, 1 Me. Rev. Stat. Ann. §§ 401-410 (1989 & Supp. 2000) (hereinafter "FOAA"). The Law Court's ruling that Petitioners are partially subject to and partially exempt from FOAA turned on the Court's construction of the "internal tribal matters" exception to the general rule that, in their governmental capacities, the Penobscot Nation and the Passamaquoddy Tribe (hereinafter "the Tribes") are treated like municipalities. *See* 30 Me. Rev. Stat. Ann. § 6206.[1]

This Court has ruled in the past that the Law Court's interpretation of the scope and applicability of Section 6206's "internal tribal matter" exception does not raise a

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[1] Section 6206 (found at Petitioners' Appendix, hereinafter "Pet. App." at 40), provides in relevant part:

> The Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities . . . and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters . . . shall not be subject to regulation by the State.

sufficiently substantial federal question to warrant this Court's review. *See Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me.), *appeal dismissed for want of substantial federal question*, 464 U.S. 963 (1983). The Court should so rule again, and reject the petition for writ of certiorari in this case.

Certain aspects of the factual, procedural, and historical record presented by Petitioners need correction or clarification.

I. THE TRIBES' UNIQUE STATUS

The Law Court's ruling, and interpretation of the Maine Implementing Act, 30 Me. Rev. Stat. Ann. §§ 6201-6214 (West 1996 & Supp. 2000) (hereinafter "MIA"), apply and are relevant solely to Maine Indians, because the status of and rules that apply to these Tribes are unique. *See Penobscot Nation v. Georgia-Pacific Corp.*, 254 F.3d 317, 320 (1st Cir. 2001) (Petitioners' status is "atypical.") The Tribes' own counsel noted: "what we wound up with was a blueprint for a governmental relationship between Indians and non-Indians alike – unlike that which exists anywhere else in the United States." (Testimony of Thomas Tureen, Public Hearing Before the Maine Joint Select Committee on Indian Land Claims, dated Mar. 28, 1980, cited in *Stilphen*, 461 A.2d at 488.)

This unique status is the product of two legislative enactments, one state and one federal (collectively "the Settlement Acts"): MIA; and Congress's ratification of MIA in the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735 (1994) (hereinafter "MICSA"). *See Stilphen*, 461 A.2d at 489 (the Settlement Acts "set up a

relationship between the tribes, the State, and the Federal government different from the relationship of Indians in other States to the State and Federal governments.")

The historical backdrop of this legislation and of the relationships between the Tribes and the State of Maine has been exhaustively treated in numerous state and federal cases. *See, e.g., Stilphen*, 461 A.2d at 487-89. The First Circuit has summarized:

> The settlement represented a partial victory for [Petitioners] and Maine: [Petitioners] obtained federal recognition as . . . Indian tribe[s] and received . . . $81.5 million appropriated under the Settlement Act (*see* 25 U.S.C. § 1733) and, in exchange, [Petitioners'] claims against Maine were extinguished. Further, while [Petitioners'] right to self-government was preserved to a limited extent, Maine was permitted to extend its jurisdiction over [Petitioners] to a greater degree than most states exercise over other Indian tribes.

Penobscot Nation v. Fellencer, 164 F.3d 706, 708 (1st Cir. 1999).

The general rule in Maine, unlike anywhere else, is, as Section 6206 expressly provides, that the Tribes enjoy the immunities and bear the responsibilities of a municipality, and are subject to state regulation. *See also* 30 Me. Rev. Stat. Ann. § 6204 (contained in the Appendix hereto, or "Resp. App.," at 4) ("Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them . . . shall be subject to the laws of the State . . . ").

The exception to this general rule applies when an "internal tribal matter" is involved, in which case neither the state nor the federal government may intrude (absent Congressional authorization). *See Akins v. Penobscot Nation*, 130 F.3d 482, 485 (1st Cir. 1997) (each tribe "in certain capacities functions as a municipality of Maine and is reachable under State and Federal law in that capacity, but when it functions as a tribe as to internal tribal matters, it is not.")

Views differ over whether the Settlement Acts limited or expanded tribal powers, but "this disagreement stem[s] primarily from . . . differing views as to the extent of the tribes' power before the settlement." *Id.* Whatever the situation before the Settlement, general judicial consensus exists as to the Tribes' status *after* passage of the Settlement Acts. The First Circuit's view is that the Settlement Acts preserved the Tribes' right to self-government only "to a limited extent." *See Fellencer*, 164 F.3d at 708. The Law Court agrees. (*See* Pet. App. at 18-19.[2])

This "municipal model" of state regulatory authority, with the "internal tribal matter" exception to state and federal authority (*see id.* at 20), is the result of a compromise in the truest sense. Both the First Circuit and the Law Court recognize that the Tribes surrendered their sovereignty except in limited instances, and in return derived substantial benefits. *See Georgia-Pac. Corp.*, 254 F.3d at 320; Pet App. at 15-17; *Stilphen*, 461 A.2d at 488 n.7. Petitioners' revision of this historical backdrop is an attempt to undo the compromise that the Settlement Acts

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[2] The decision below is set out in full at pages 1-35 of the Appendix to the Petition for Certiorari and is cited herein as "Pet. App.," followed by the Appendix page number.

achieved, the benefits of which the Tribes already have received.

II. RESPONDENTS' INTERACTION WITH THE TRIBES LEADING UP TO THE FOAA REQUESTS

Respondents discharge wastewater into rivers in Maine under federal and state discharge licenses. Pursuant to the National Pollutant Discharge Elimination System ("NPDES") program of the federal Clean Water Act, 33 U.S.C. §§ 1251-1387 (West 1986 & Supp. 2000), the State of Maine has applied to the U.S. Environmental Protection Agency ("EPA") to obtain primary authority to issue all NPDES permits in the State of Maine. (*See* Pet. App. at 2.) In response to the State's application, the Tribes asked EPA to conclude that the State is not entitled to regulate water resources within their territories, because, the Tribes said, they are entitled under Section 1377(e) of the Clean Water Act to be treated like a separate "state." (*See id.* at 3.)[3]

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[3] In their Petition (n.11), the Tribes continue to suggest that this point is factually incorrect. While not relevant to the legal analysis, the limited documents to which Respondents have had access to date indicate the contrary. (*See, e.g.*, Feb. 28, 2000 letter from the Penobscot Nation to EPA (seeking treatment as state ("TAS") status for purposes of grant funding, and asserting that "the Nation has jurisdiction over the resources affected by the program" and that "the Nation has jurisdiction exclusive of the State of Maine over its internal tribal matters"; "As with all land use matters, new construction is within the exclusive jurisdiction of the Nation as an internal tribal matter"); and Sept. 10, 1993 letter from EPA to Penobscot Nation (offering the clarification sought by the Penobscot Nation "as to why this approval of TAS status is limited to the water quality CWA § 106

Thus, Petitioners appear to be taking the position before the EPA that they – and not the State of Maine – should have regulatory authority over water resources that Petitioners contend are within Indian Territory. This position is directly contrary to the express language of the Settlement Acts. *See, e.g.*, 30 Me. Rev. Stat. Ann. § 6204 (Resp. App. at 4) ("Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them . . . shall be subject to the laws of the State . . . ").

At the same time, on March 9, 2000, counsel for the Companies discovered the existence of Tribal Environmental Agreements ("TEAs") between the Tribes and the EPA, executed between June and October 1999. (*See* Record Item No. 14 before the Maine Supreme Judicial Court, in *Great N. Paper, Inc. v. Penobscot Nation*, Docket No. CUM-00-573, at ¶ 6.) These TEAs provide, among other things, that the EPA will make its best efforts to protect from disclosure all communications that have been exchanged between the EPA, other federal agencies, the Tribes, and the parties' representatives, when such communications are requested under the federal Freedom of Information Act ("FOIA"). (*See id.*, ¶ 4.)

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grant purposes and to the water resources over which the Tribe exercises management and protection functions for purposes of the grant activities"), attached as Exhibits E and F to Respondents' Opposition to Motion For Stay, dated August 15, 2001, before the Superior Court.)

III. RESPONDENTS' FOAA REQUESTS AND THE RESULTING LITIGATION

Faced with the Tribes' efforts to convince the EPA to disregard the terms of the Settlement Acts, along with the EPA's agreement to use its best efforts to conceal any ongoing communications with the Tribes, Respondents served state FOAA requests on the Tribes. Respondents' requests sought "documents relating to the Tribes' efforts to gain regulatory powers over water resources within or adjacent to their borders." (Pet. App. at 3.) Respondents seek to view these documents at the Tribal offices "or other reasonable location." (FOAA Requests, found at Ex. A to Complaint, Record Item 1.)[4]

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[4] FOAA provides that the public shall have the right to inspect records during the regular business hours "of the custodian or location of such record." 1 Me. Rev. Stat. Ann. § 408. Thus, it is the decision of the possessor of the record where to maintain those records and allow inspection. Contrary to the Tribes' claims throughout their Petition, Respondents have never insisted on viewing the documents at their reservations; have said so on frequent occasions (*e.g.*, the FOAA requests themselves, Ex. A to Record Item 1); and would in fact prefer to view them off-site, *e.g.*, in the Tribes' attorneys' offices in Portland.

In a letter dated Oct. 17, 2000, Respondents' counsel wrote: "The Penobscot Nation states that we will not be allowed onto Indian Island to review records. This position is unacceptable and not in compliance with the requirements of the FOAA. The FOAA expressly states that 'every person shall have the right to inspect and copy any public record during the regular business hours of the custodian or location of such record . . . .' " Consistent with the FOAA requests themselves, counsel thus cited the public's right to view documents where the custodian chooses to locate the records – this may or may not be on the Tribes' territories, as they choose. In any event, as discussed

"After [the Tribes] received notice from [Respondents] but before [Respondents] could get to state court under the statutorily required waiting period, [the Tribes] filed [a] federal lawsuit against [Respondents] seeking an injunction against any state court lawsuit and a declaratory judgment that the Maine Freedom of Access Act violates 'their federal right to be free of such state regulation.' " *Penobscot Nation v. Georgia-Pac. Corp.*, 106 F. Supp. 2d 81, 82 (D. Me.), *reconsideration denied*, 116 F. Supp. 2d 201 (D. Me. 2000), *aff'd on other grounds*, 254 F.3d 317 (1st Cir. 2001).

Petitioners rejected Respondents' FOAA requests, declaring that no aspect of FOAA applied to them, "because 'the application of that law . . . would amount to state regulation of [the Tribes'] governmental process, policies, and procedures.' " (Pet. App. at 5; ellipsis and square brackets in original.) The Tribes offered to produce records in their possession that were not confidential under Petitioners' unspecified tribal laws and policies or otherwise protected from disclosure under Maine's discovery and evidentiary rules. (*See id.*)

Because the Tribes thus declined to allow inspection, Respondents, following the procedure set forth in 1 Me. Rev. Stat. Ann. § 409(2), filed a suit in state court to compel production. Shortly thereafter, Respondents filed a motion for partial summary judgment. (Pet. App. at 5.) The purpose of Respondents' motion for partial summary judgment was to resolve the primary basis raised by the

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infra, this point is academic, because the Law Court never ordered any access to tribal lands, but only that the Tribes produce copies of certain documents.

Tribes for rejecting the FOAA request: that MIA's "internal tribal matters" exception removed any duty by the Tribes to respond under FOAA. The motion was only for partial summary judgment, because the Tribes had also alluded to an attorney-client privilege/work product claim as to unidentified documents.

The Tribes opposed the motion for partial summary judgment and moved to dismiss the state court action, claiming that the state court lacked subject-matter jurisdiction, and that application of FOAA to them would amount to regulation of "internal tribal matters," in violation of MIA. (*See id.* at 6.)

On September 19, 2000, the Superior Court (Crowley, J.) rejected the Tribes' motions and granted the Companies' motion for partial summary judgment. (*See id.* at 76.) Citing First Circuit decisions such as *Fellencer* and *Akins*, the Superior Court found that the document requests did not intrude upon an "internal tribal matter" within the meaning of MIA, because the subject matter of the requests (water regulation) affected non-tribal members and implicated state authority and interests. (Pet. App. at 75.)

In order to facilitate immediate appeal, Justice Crowley entered an order giving the Tribes two weeks to: (1) produce the documents over which no attorney-client privilege/work product was claimed; and (2) provide a privilege log as to the remaining documents. (*See id.*) The Tribes filed a motion for reconsideration, which Justice

Crowley denied on September 27, 2000. (*See* Resp. App. at 17, entry dated Sept. 28, 2000).[5]

The Tribes were equally unsuccessful on the federal front. The United States District Court for the District of Maine (Hornby, C.J.) dismissed that suit for lack of subject matter jurisdiction under the well-pleaded complaint rule. *See Penobscot Nation*, 106 F. Supp. 2d at 86. Once again, the Tribes filed a motion to reconsider, pursuant to which Judge Hornby again found jurisdiction lacking. *See Penobscot Nation v. Georgia-Pacific Corp.*, 106 F. Supp. 2d 81 (D. Me.), *reconsideration denied*, 116 F. Supp. 2d 201 (D. Me. 2000).

IV. PROCEEDINGS SUBSEQUENT TO THE ORDER TO PRODUCE DOCUMENTS

The Tribes did not appeal Justice Crowley's September 19, 2000 order. Nor did they choose to comply with the order. They did not file a privilege log, nor seek any extension of time to do so. They produced no documents. They chose to do nothing, openly defying the Superior Court.

With neither an appeal nor compliance forthcoming from the Tribes, Respondents filed motions for entry of final judgment and for contempt. (*See* Resp. App. at 17, entry dated Oct. 10, 2000). After a hearing on October 18, 2000, Justice Crowley granted the motion for final judgment, because the Tribes' failure to respond in any way to the September 19, 2000 order constituted a waiver of any

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[5] A certified copy of the trial court docket was before the Law Court as part of the parties' jointly filed Appendix. A copy of that certified docket is included in the Appendix to this Brief.

assertion of attorney-client privilege or application of the work product doctrine. (*See* Pet. App. at 6-7.)

The Superior Court did not rule, however, on the motion for contempt. Rather, it continued the action for an evidentiary hearing on November 9, 2000, in order to give the Tribes more time to comply with the order to produce documents or file an appeal of the now final judgment. (*See* Resp. App. at 7, entry dated Oct. 20, 2000.)[6]

The Tribes responded to this allowance of more time to appeal or comply by suing Justice Crowley in federal court. *See Penobscot Nation v. Honorable Robert E. Crowley*, Civil No. 00-222-B-S (D. Me. Oct. 31, 2000). Judge Carter rejected their motion for preliminary injunction; the Tribes withdrew the suit and sought an expedited appeal of Judge Hornby's dismissal. *See id.*, Order dated Nov. 6, 2000 at 2.

In the state court forum, the Tribes continued to defy the Superior Court, neither complying with its order nor appealing from it. This left Justice Crowley with no choice on November 9, 2000 but to find the Tribes in contempt.

Justice Crowley ordered coercive imprisonment of the three tribal leaders named as parties before him and coercive fines against the Tribes themselves. Yet one more time, however, the state court gave the Tribes another chance. Justice Crowley ordered that any fines or imprisonment would be suspended pending any appeal to the Law Court; as to the individual tribal leaders, he

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[6] The filing of an appeal in Maine automatically stays execution of judgment. Maine Rule of Civil Procedure 62(a).

further ordered that the sentences of coercive imprisonment should be stayed until November 13, 2000, to give them another opportunity to appeal or comply. (*See* Resp. App. at 26.)

Finally, on the last available day, November 13, 2000, having delayed proceedings in state court as long as possible without subjecting their leaders to actual imprisonment, all the while accelerating the federal appeal, the Tribes filed their Notice of Appeal of Justice Crowley's final judgment. (*See* Resp. App. at 28-29.)

The Law Court ruled on that appeal on May 1, 2001. (*See* Pet. App. 1-36.) Surveying the legislative history and case law in depth, the Law Court affirmed in part and vacated in part Justice Crowley's order to produce documents, vacated Justice Crowley's contempt order, and remanded to Justice Crowley to resolve any remaining disputes over the scope of the Tribes' obligation to produce documents. (*See id.* at 33-34.)

Both the Superior Court and the Law Court concluded that MIA's "internal tribal matters" exception did not blanketly preclude any application of FOAA. While Justice Crowley had focused primarily on the subject matter of the FOAA request to determine whether the exception was implicated, the Law Court focused on the processes associated with creation of the documents. Documents, such as minutes of tribal meetings, reflect "deliberative processes of self-government," the Law Court reasoned, and, therefore, are excluded from production. In contrast, other documents, such as inter-governmental communications from the Tribes to the EPA, do not form a part of the internal tribal governmental process; therefore, the exception does not apply. (*Id.* at 31-34.)

On May 31, 2001, the Law Court denied the Tribes' request for reconsideration. (*See* Pet. App. at 36.) On June 20, 2001, the First Circuit (Boudin, C.J.) affirmed the dismissal of the Tribes' federal suit, on the grounds that the final judgment in the state court was entitled to full faith and credit in the federal court and would bar the injunctive relief that the Tribes requested in the federal suit. *See Georgia-Pac. Corp.*, 254 F.3d at 325. The First Circuit denied the Tribes' request for rehearing and for rehearing en banc on August 24, 2001. *See Penobscot Nation v. Georgia-Pac. Corp.*, Docket No. 00-2265, orders dated Aug. 24, 2001 (1st Cir.).

The FOAA requests are currently pending before the Maine Superior Court on remand. The Law Court ordered that Petitioners be given a reasonable time to comply with its order of production. Orally, the Superior Court on September 6, 2001 ordered that he would grant a stay of actual production of documents pending resolution of this certiorari petition, while requiring the parties to brief the remand issues clarifying the exact documents to be produced.

Throughout this 19-plus month process, Respondents have consistently sought expedition, since the documents could prove relevant to the EPA's pending NPDES decision, which could issue at any time.